Mohd Azlan bin Hj Zainal Abidin & Ors v Pegawai Penerima Syarikat Cosmopro & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO AT1–22–1179 OF 2009
SURAYA OTHMAN J
7 APRIL 2014

Civil Procedure — Setting aside — Setting aside — Default judgment — Default judgment served four years later — Whether abuse of court process — Whether should have filed application for extension of time — Rules of Court 2012 O 13 r 1 & O 19

The applicant had filed an application under O 13 r 1 and O 19 of the Rules of Court 2012 ('the ROC') to set aside the judgment in default of appearance obtained by the respondents on 2 October 2009 against them. According to the applicant, the default judgment of appearance order was served to them four years later and the applicant filed the said application three and a half months later to set aside the default judgment. The applicant submitted that the delay of three and a half months in filing the said application to set aside the default judgment was not an inordinate delay; and that it was never served with the amended statement of claim dated 12 November 2009, which was a month after the said default judgment was obtained. The respondents raised preliminary objections and contended that the said application was defective and an abuse of the court process; the said application was filed out of time since it exceeded the mandatory 30 days permitted under O 42 r 13 of the ROC; and the applicant should have filed an application for an extension of time to file the said application and give reasonable explanation for the inordinate delay.

Held, dismissing the application:

(1) Order 13 r 1 provides for the plaintiff to enter a final judgment against a defendant for a liquidated amount claimed if the defendant fails to enter an appearance within the time permitted under the ROC. It has nothing to do with the setting aside application at hand. Order 19 is not specifically relevant to the said application. The application was defective as the correct order for the applicant to cite or refer to in the said application would be O 42 r 13. The applicant could also cross refer to O 13 r 8 since it provided for the setting aside of a default judgment of appearance which was the crux of its application (see paras 8–9).

(2) The applicant should have filed a formal application for extension of time. This, she failed to do. Instead, she had by-passed or ignored that

requirement and went straight to make the said 'out of time' application. A satisfactory or reasonable explanation must be given for the delay and without an application for extension of time with an accompanying affidavit explaining the reasons for the delay, how was the court to consider whether the circumstances as faced by the applicant justified the delay in making the application (see paras 24–25).

(3) The applicant could have filed for an extension of time to enlarge the 30 days limitation under O 3 r 5 or under O 92 r 4 of the ROC but did not do so. The applicant intentionally and completely ignored the rules and straight away filed the said application. The reasons given for the delay in the said application was not satisfactory (see para 34).

[Bahasa Malaysia summary

Permohon telah memfailkan permohonan di bawah A 13 k 1 dan A 19 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk mengetepikan penghakiman ingkar yang diperolehi daripada responden-responden pada 2 October 2009 terhadap mereka. Mengikut pemohon, penghakiman ingkar perintah kehadiran diserahkan ke atas mereka empat tahun kemudiannya dan pemohon memfailkan permohonan tersebut tiga setengah bulan kemudiannya untuk mengetepikan penghakiman ingkar tersebut. Pemohon berhujah bahawa kelewatan tiga setengah bulan dalam memfailkan permohonan untuk mengetepikan penghakiman ingkar tersebut adalah kelewatan terlampau; dan bahawa ia tidak pernah diserahkan dengan pernyataan tuntutan yang dipinda bertarikh 12 November 2009, yang mana adalah sebulan selepas penghakiman ingkar tersebut diperolehi. Responden-responden membangkitkan bantahan awalan dan berhujah bahawa permohonan tersebut adalah cacat dan penyalahgunaan proses mahkamah; permohonan tersebut difailkan di luar masa memandangkan ia melebihi 30 hari mandatori yang dibenarkan di bawah A 42 k 13 KKM; dan pemohon sepatutnya memfailkan permohonan untuk perlanjutan masa untuk memfailkan permohonan tersebut dan memberi penjelasan yang munasabah bagi kelewatan terlampau tersebut.

Diputuskan, menolak permohonan:

(1) Aturan 13 k 1 memberikan plaintif untuk memasuki penghakiman akhir terhadap defendan untuk jumlah tertentu yang dituntut jika defendan gagal untuk memasukan kehadiran dalam masa yang dibenarkan di bawah KKM. Ia tidak ada kena mengena dengan permohonan untuk mengetepikan. Aturan 19 bukan secara khusus relevan kepada permohonan tersebut. Permohonan adalah cacat kerana perintah betul untuk pemohon nyatakan atau rujuk di dalam permohonan tersebut adalah A 42 k 13. Pemohon juga dapat merujuk balas kepada A 13 k 8 memandangkan ia memperuntukan untuk mengetepikan penghakiman ingkar kehadiran yang mana adalah teras permohonannya (lihat perenggan 8–9).

(2) Pemohon sepatutnya memfailkan permohonan rasmi untuk perlanjutan masa. Ini, dia gagal berbuat sedemikian. Sebaliknya, pemohon telah melangkau atau tidak mengendahkan keperluan tersebut dan terus untuk membuat permohonan '*out of time*' tersebut. Penjelasan yang memuaskan atau munasabah mesti diberikan untuk kelewatan dan tanpa permohonan untuk perlanjutan masa dengan disertai afidavit menjelaskan alasan-alasan untuk kelewatan, bagaimana mahkamah dapat mempertimbangkan sama ada keadaan yang dihadapi oleh pemohon menjustifikasikan kelewatan dalam membuat permohonan tersebut (lihat perenggan 24–25).

(3) Pemohon sepatutnya boleh memfailkan untuk perlanjutan masa untuk membesarkan had masa 30 hari di bawah A 3 k 5 atau di bawah A 92 k 4 KKM tetapi tidak berbuat sedemikian. Pemohon dengan niat dan tidak mengendahkan sepenuhnya peraturan-peraturan dan secara terus memfailkan permohonan tersebut. Alasan-alasan yang diberikan untuk kelewatan dalam permohonan tersebut adalah tidak memuaskan (lihat perenggan 34).]

Notes

For cases on setting aside, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 7909–7913.

Cases referred to

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223; [1997] 1 CLJ 396, CA (refd)

MBT (Malaysia) Sdn Bhd v Asa Wira Sdn Bhd [2004] MLJU 24; [2004] 1 CLJ 661, HC (refd)

Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105 (refd)

Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors [1997] 1 MLJ 453; [1996] 4 CLJ 461, CA (refd)

Pacific Inter-Link Sdn Bhd v Pemilik Kapal atau Vesel 'Makatsarija' [1999] MLJU 721; [2000] 2 CLJ 679, HC (refd)

Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85; [1996] 3 CLJ 321, CA (refd)

President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd [1997] MLJU 216 ; [1998] 1 CLJ 169, HC (refd)

R v Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd [1976] 1 All ER 897; [1976] 1 WLR 362, CA (refd)

Thiruchelvasegaram a/l Manickavasegar v Mahadevi alp Nadchatiram [1998] 4 MLJ 297, CA (refd)

Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678, HC (refd)

Legislation referred to

Rules of Court 2012 O 1A, O 2, O 3 r 5, (1), (2), O 13 r 1, r 8, O 19, O 32 r 13(2), (a), O 42 r 13

Shopna Rani Malakar (Shopna Rani Malakar & Co) for the third defendant.
Mohaji Selamat (Ahmad Fakhri Abu Samah with him) (Mohaji, Hazuri & Ismail) for the plaintiffs.

Suraya Othman J

INTRODUCTION

[1] The third defendant/applicant, Mercu Sa-lam Sdn Bhd, filed an application under O 13 r 1 and O 19 of the Rules of Court 2012 ('the RC 2012') to set-aside the judgment in default of appearance obtained by the plaintiffs on 2 October 2009 against them. The third defendant alleged that they were only served with the default judgment of appearance order on 28 September 2013, a good four years later. Thereafter, the third defendant filed this application ('said application') on 13 January 2014, three and a half months later to set-aside the default judgment. The said application was heard on 17 February 2014. On the hearing of the said application, the plaintiffs raised three preliminary objections, ie that the said application is defective; the said application was filed out of time and there was no application made to extend the time to file the said application and to explain the inordinate delay by the third defendant. I heard the said application and dismissed it with costs of RM2,000. The third defendant, dissatisfied, appealed against my decision.

THIRD DEFENDANT/APPLICANT'S SUBMISSION

[2] The third defendant was represented by Ms Shopna Rani Malakar. On the date of hearing of her application on 17 February 2014, Ms Shopna Rani Malakar was not present but had filed her written submission. Among the arguments laid down in her written submission to support her application are that the plaintiffs took four years to serve the default judgment order dated 2 October 2009 to the third defendant on 28 September 2013. She only managed to attain the cause papers on 13 November 2013 and that the delay of three and a half months in filing the said application to set aside the default judgment is not an inordinate delay. Apart from that she contended that the third defendant was never served with the amended statement of claim dated 12 November 2009, ie a month after the said default judgment was obtained, which she submitted is highly irregular. In the alternative, if this court is of the view that the default judgment was regularly obtained, then she argued that the

A third defendant has a defence on merits.

THE PLAINTIFFS/RESPONDENTS' SUBMISSION

B **[3]** The plaintiffs were represented by Mr Mohaji Selamat and assisted by Mr Ahmad Fakhri Abu Samah. From the outset, Mr Mohaji Selamat raised a preliminary objection ('PO') to the third defendant's application which PO has been set out in paras 5 to 16 in the plaintiffs' affidavit in reply (encl 24) to the said application. In short, the plaintiffs submitted that the said application which was made under O 13 r 1 and O 19 of the RC 2012 is defective and an C abuse of process of court. Further, the plaintiffs contended that the said application was filed out of time since it was filed exceeding the mandatory 30 days permitted under O 42 r 13 of the RC 2012. The plaintiffs argued that the third defendant should have first filed an application for an extension of time or enlargement of time to file the said application and give a reasonable D explanation for the inordinate delay. This, the third defendant failed to do.

DECISION OF THE COURT

E **[4]** It must be noted that this civil suit, No 22–1179 of 2009 has been consolidated and will be heard together with civil suit No 21-390 of 2009. In civil suit No 21–390 of 2009, judgments in default of appearance and defence had been entered against the third defendant by the plaintiffs. The third defendant has filed two applications: for extension of time to file an affidavit F which was out of time and to set aside the judgment in default ordered against them. These two applications are being case-managed by the registrars and will be set for hearing once the cause papers are in order.

[5] Reverting to the said application at hand, in deciding this application, I G have referred to the cause papers and submissions filed, as set below:

(a) writ of summons and statement of claim dated 7 August 2009;

(b) plaintiffs' amended statement of claim dated 12 November 2009 ('amended claim');

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(c) judgment in default of appearance obtained on 2 October 2009;

(d) notice of application by third defendant to set aside the judgment in default with supporting affidavit affirmed by Rosli bin Hassan dated 13 January 2014 (encls 22 and 23 respectively);

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(e) affidavit in reply by the plaintiffs' affirmed by Ahmad Marzuki bin Mahmud dated 27 January 2014 (encl 24);

(f) affidavit in reply by the third defendant affirmed by Rosli bin Hassan dated 7 February 2014 (encl 25).

(g) written submission in English by third defendant (encl A);

(h) written submission in Bahasa Malaysia by the plaintiffs (encl B).

APPLICATION UNDER O 13 R 1 AND O 19, RC 2012 IS DEFECTIVE AND ABUSE OF PROCESS OF COURT

[6] The third defendant filed the application to set aside the judgment in default order under O 13 r 1 and O 19 of the RC 2012. The plaintiffs' counsel, Mr Mohaji Selamat submitted that the intitule and the application are defective since the third defendant should have made the application under O 42 r 13.

[7] I agree with learned counsel for the plaintiffs.

[8] Order 13 r 1 provides for the plaintiff to enter a final judgment against a defendant for a liquidated amount claimed if the defendant fails to enter an appearance within the time permitted under the rules. It has nothing to do with the setting aside application at hand. As to O 19, it has nine rules. Which particular rule or rules the third defendant is referring to in making her application? Order 19 provides for the plaintiff to apply for a default judgment against a defendant who has not filed a defence within time or a defendant to apply for a default judgment against a plaintiff who has not filed a defence to the defendant's counter-claim within time or for the defendant to apply for the plaintiff's claim to be dismissed if the plaintiff failed to serve on the defendant the statement of claim within the time permitted under the rules. Again, O 19 is not specifically relevant in the third defendant's setting aside application at hand. I am bewildered that Ms Shopna Rani Malakar had not been specific in quoting the provisions under the RC 2012 by which she is making this application. One has to be specific and not generalise in stating under which order or rule one is making and not expect that 'one size fits all' for any or every application one makes to the court.

[9] As pointed out by Mr Mohaji Selamat, the correct order for Ms Shopna Rani Malakar to cite or refer to in the setting aside application would be O 42 r 13. If I may add, she can also cite or cross refer to O 13 r 8 since it provides for the setting aside of a default judgment of appearance which is the crux of her application. Since she failed to cite or refer to the correct order or rule, I find her application to be defective.

APPLICATION FILED OUT OF TIME OR AFTER THE 30 DAYS LIMITATION UNDER O 42 R 13 OF THE RC 2012

[10] Order 42 r 13 states:

> Setting aside or varying judgment and orders (O 42 r 13)
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> 13. Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the court and serve it on the party who has obtained the order or judgment *within thirty days after the receipt of the order or judgment by him.*

[11] Order 13 r 8 states:

> Setting aside judgment (O 13 r 8):
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> 8. The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

[12] Order 42 r 13 imposed upon the third defendant to file the setting aside application within 30 days after the receipt of the default judgment order. In our present application, Ms Shopna Rani Malakar admitted that the order was served on the third defendant on 28 September 2013 and that she had filed the said application on 13 January 2013, three and a half months later, thus a delay of two and a half months. She submitted that the delay was due to the attainment of documents which were only possible two months after the said order was being served and that the delay was not an inordinate delay.

[13] Let us examine O 42 r 13. A perusal of O 42 r 13 discloses that the drafters have used the terminology 'shall'. ie 'shall make an application within 30 days after the receipt of the order or judgment'. The word 'shall' denotes that the provision is mandatory and must be adhered to strictly. In *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85; [1996] 3 CLJ 321, the Court of Appeal held that the word 'must' is equated in meaning to the word 'shall' and implies a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. Siti Norma Yaakob JCA, (as she then was), in delivering the judgment of the court held that the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such a discretion.

> The word 'must' as opposed to 'may' is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. We equate the meaning of the word 'must' as that given to the word 'shall' and for that reason the choice of the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such a discretion to state otherwise would defeat the very purpose of O 32 r 13(2)

was intended ie to prevent any last minute affidavit being filed so as to protract the hearing of any proceedings in chambers.

[14] In *Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678, Abdul Kadir Sulaiman J, (as he then was), considered the word 'must' in the context of O 32 r 13(2) and held that the word 'must' is an imperative word and in its ordinary meaning is a word of absolute obligation. In his judgment, he stated:

> Order 32 r 13(2)(a) uses the imperative word 'must'. In its ordinary meaning, it is a word of absolute obligation. Therefore, for the failure of the plaintiff to have the affidavit in support served upon the defendant within the time limit allowed by the rule, I would agree with the submission of the learned counsel for the defendant that it renders the said affidavit inadmissible. *O 2 r 1 of the RHC would not be of help to the plaintiff as no reason was put forward by the plaintiff for the delay in the service of the said affidavit apart from using the order as a shield.* (Emphasis added.)

THE QUESTION HERE IS CAN THE NON COMPLIANCE WITH THE REQUIREMENT OF O 42 R 13 BY THE THIRD DEFENDANT BE RECTIFIED

[15] Mr Mohaji Selamat submitted that the third defendant should have first filed an application for an extension of time or enlargement of time to file the said application and give a reasonable or satisfactory explanation for the inordinate delay. This, the third defendant failed to do.

[16] I agree with learned counsel for the plaintiffs. The RC 2012 are comprehensive and exhaustive. There are provisions in it for the enlargement or the extension of time under O 3 r 5. Order 3 r 5 allows time to be extended by the court, even after the expiration of that period and by consent in writing by parties without a court order. Order 3 r 5 states:

> Extension of time (O 3 r 5):
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> (1) The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these Rules or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The court may extend any such period as referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
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> (3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent in writing without an order of the court being made for that purpose.

[17] As stated earlier, the third defendant can seek redress from the court under O 3 r 5 for extension of time to file the setting aside application which is out of time. The third defendant should have filed a formal application for

extension of time. This, they had failed to do. Instead, they had bypassed or ignored that requirement and went straight to make the said application. What are the consequences of this failure on their part?

[18] In *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453; [1996] 4 CLJ 461, CA, the Court of Appeal, at held No 5 stated:

> [5] Order 32 r 13(2) of the Rules of the High Court 1980 is mandatory in nature. Bearing this in mind, and the fact that the statement of claim was served on 13 April 1994, Eng's affidavit was rightly rejected by the learned judge. On the facts, there was not a word in Eng's affidavit which sought to explain the delay. The delay was therefore perverse. Finego *could have applied for extension or abridgment of time under O 3 r 5 of the RHC but that had not been done.*

[19] In *Thiruchelvasegaram a/l Manickavasegar v Mahadevi alp Nadchatiram* [1998] 4 MLJ 297 the Court of Appeal at held No 1 stated:

> Under O 3 r 5(1) and (2) of the Rules of the High Court 1980 ('the RHC'), the court has jurisdiction to extend time even if the application is made after the expiry of the period. *The primary consideration in exercising discretion to extend time is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.*

[20] In *R v Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd* [1976] 1 All ER 897; [1976] 1 WLR 362 (CA), held that:

> The county court had a wide inherent jurisdiction to control its own procedure. That included the power to enlarge or extend any time limits attaching to an order granted at an earlier hearing by a different judge. The court's powers were not limited to what was expressly stated in the rules of practice and applied even where the application for an extension of time was made after the relevant period had elapsed.

[21] In *President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd* [1997] MLJU 216; [1998] 1 CLJ 169, HC, it was held that:

> [2] Furthermore, the defendant's affidavit was filed after the hearing had commenced. The defendant should have at least applied to the court for leave to file an affidavit out of time and if it had done so, the court could have exercised its discretion under O 92 r 4 of the RHC. No such application had been made and the affidavit therefore was rejected.

[22] In *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; [1997] 1 CLJ 396, the Court of Appeal when touching on the issue of delay said this:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim vigilantibus, non dormientibus, jura subveniunt, though having its origins in the Court of Chancery, is of universal application. *Even in cases where a right is exercisable ex debitio justitiae, a court may refuse relief to an indolent litigant.*
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> In all cases in which delay in approaching the court is in issue, *the burden is upon the litigant who has delayed to render a satisfactory explanation for it.* Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case.

[23] In *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105, Hashim Yeop Sani J (as he then was), held that:

> It is trite law that the court has unfettered discretion to grant or refuse an extension of time. *The first principle is that the rules of court must prima facie be obeyed and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant.* For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules on limitation of period.
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> In considering whether to grant or refuse extension of time the length of time that has lapsed is always a material factor to be considered by the court exercising the discretion. On the facts of this case I was not able to honestly say that there was any valid ground for the delay and therefore refused the application for extension of time.

[24] As stated earlier, the third defendant should have filed a formal application for extension of time. This she had failed to do. Instead, she had bypassed or ignored that requirement and went straight to make the said 'out of time' application. As stated in *Ong Guan Teck & Ors*, 'the first principle is that the rules of court must prima facie be obeyed and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules on limitation of period'. And, also, as stated in *Thiruchelvasegaram a/l Manickavasegar's* case, the 'primary consideration in exercising discretion to extend time is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances'.

[25] Thus, since no effort was made whatsoever to file a formal application for extension of time, should not this court just dismissed the setting aside application since the third defendant had intentionally and completely ignored or flout the rules. Besides, a satisfactory or reasonable explanation must be given for the delay and without an application for extension of time with an accompanying affidavit explaining the reasons for the delay, how is the court to

consider whether the circumstances as faced by the third defendant justify the delay in making the said application.

[26] On the face that no application for extension of time was made by the third defendant, and the setting aside application is out of time, can this court, on its own motion, cure or rectify the non-compliances on the part of the third defendant under O 2 or O 1A. Order 2 provides that non-compliance with the requirement of the rules shall be treated as an irregularity which can be cured and O 1A states that in administering the rules, the court or judge should have regard to the overriding interest of justice and not only to the technical non-compliance with the rules.

[27] Order 2 states:

> Non compliance with Rules (O 2, r 1)
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> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, non compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
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> (2) These Rules are a procedural code subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.
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> (3) The Court or Judge may, on the ground that there has been such non-compliance as referred to in paragraph (1), and on such terms to as costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these Rules to allow such amendments, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity.

[28] Order 1A states:

> Regard shall be to justice (O 1A)
>
> In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

[29] In the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC, Zaki Tun Azmi (CJ), delivering the decision of the court at paras 4, 43, 44, 46 and 50 said this:

> [4] A general provision such as O 1A RHC must not supersede a mandatory requirement of the Rules. Order 1A RHC cannot be invoked *when a party*

intentionally disregards in complying with the rules.

[43] Accordingly, I have no hesitation in answering the first question posed in the positive, that is to say, the requirements of 0 6 r 7(2A) are mandatory prerequisites. This means that the applications for extension of time for service of the writs made by the respondents are defective as they do not show compliance with the RHC.

[44] Now to O 1A RHC. This order relates to the administering of Rules to the High Court 1980. In order to invoke O 1A RHC, parties must apply the object of the Rules first. Order 1A RHC reads as follows:

Order 1 A: Court or judge shall have regard to justice.

In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical con-compliance of any of the rules herein.'

[46] *The technical non compliance of any rules may be remedied where there is an accidental omission or oversight by a party.* A general provision such as O 1A RHC 1980 is for the court or judge to give heed to justice over technical non compliance. It must not supersede a mandatory requirement of the Rules. 0 1A RHC cannot be invoked when a party intentionally disregards in complying with the rules. Otherwise, parties would be encouraged to ignore the Rules. Thus in this case, O 1A RHC does not apply as the respondents had intentionally disregarded O 6 r 7(2A) RHC for their own reasons.

[50] As I had mentioned in court, if O 1A is sought to be invoked whenever a party fails to comply with any provision of the rules, then the whole of the Rules of the High Court 1980 would be rendered useless. For example, can failure to enter appearance or file defence within the specified period be considered as an irregularity? Of course it cannot be. A party is late in filing the relevant papers must obtain an order from the court to extend the time, if such extension is required and is permitted by the Rules. Therefore, the answer to question two is in the negative.

[30] In the case of *Pacific Inter-Link Sdn Bhd v Pemilik Kapal atau Vesel 'Makatsarija'* [1999] MLJU 721; [2000] 2 CLJ 679, HC, the court held that:

When the rules of course provide for a specific manner and time frame for the service of an affidavit intended to be used in support of an application, these rules must be fully observed and complied with. This is an absolute obligation where r 1 of the RHC is of no assistance.

[31] In the case of *MBT (Malaysia) Sdn Bhd v Asa Wira Sdn Bhd* [2004] MLJU 24; [2004] 1 CLJ 661, HC, Abdul Malik Isyak J, at p 672, said this:

It is a correct proposition of the law to say that the 'curing provision' should not be wantonly utilised.

It is salutary to recall to mind the sage words of Edgar Joseph Jr J (as he then was), in the case of *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 CLJ 56; ([1984] 2 CLJ (Rep) 319. There at p 59 (p 325) of the report, his Lordship aptly said:

The rules in my opinion, therefore, have statutory force and are not mere rules of practice. The net result would be this. I refused to exercise my discretion in favour of the plaintiff for the following reason:

(a) that it is a fundamental principle of law that the RHC must be strictly complied with;

(b) that the powers vested in O 2 r 1 of the RHC are the exceptions to the general rule, these powers should be exercised sparingly and it should be used to give the litigants a carte blanche cover to overlook all forms of irregularities;

(c) that in order for the court to exercise its discretion under O 2 r 1 of the RHC, there must be some material to satisfy the court in exercising its discretion;

(d) If the recalcitrant fails to provide any justification or reason for the non-compliance with the rules as embodied in the RHC, then the court ought to be reluctant to cure those defects because O 2 r 1 of the RHC should not be used wrongly; and

(e) a mere omission or oversight on the part of the litigants and their legal advisers should not be an excuse to invoke all pervading powers under O 2 r 1 of the RHC.

[32] Revering to our present case, at para 4 of the affidavit in support of the said application, affirmed by Mr Rosli bin Hassan (encl 23), he stated that the third defendant received the default judgment order in October 2013. He affirmed that the third defendants' solicitors then wrote to the plaintiffs' solicitor and received the cause papers on 13 November 2013. At para 5 of his affidavit in reply, (encl 25), Mr Rosli bin Hassan, once again, affirmed that the cause papers were received in the middle of November 2013 and that the said application was filed on 13 January 2014, a delay of three months, which he opine, was not an inordinate delay and does not prejudice the plaintiffs.

[33] Ms Shopna Rani Malikar in her submission admitted that the judgment in default order was served on the third defendant on 29 September 2013. There seems to be some confusion or contradiction about the dates between the third defendant and their counsel, whether the judgment in default order was received on 29 September 2013 or in October 2013. Be that as it may, it must be noted that on 24 October 2013, the third defendant's counsel, Ms Shopna Rani Malakar was present before me in court for an application under civil suit No 21-390 of 2009 (which is consolidated with the present suit) and was well aware of the default judgment against her client in the present suit. She could at that point of time requested from the plaintiffs' solicitors the cause papers or failing to receive them, retrieve the documents from the registry, if she had wanted to. She could then have filed the said application before 29 October 2013, well within the 30 days period permitted

under O 42 r 13. Even if she had received the cause papers on 13 November 2013, as affirmed by Mr Rosli bin Hassan, she could still, with diligence, had filed the said application within time if she contended that the judgment in default order was received in mid October 2013. But this she did not do.

[34] Further, she could have filed for an extension of time to enlarge the thirty days limitation under O 3 r 5 (general provision for abridgment or enlargement of time) or under O 92 r 4 (inherent powers of the court), but this she did not do. She intentionally and completely ignored the rules and straight away filed the said application. The reasons given for the delay as found in the affidavit of Rosli bin Hassan, in the said application, too, is not satisfactory.

[35] As such, on these facts and circumstances, are O 2 and O 1A justified to be invoked by this court, on its own motion, to cure the intentional and complete disobedience to comply with the rules. I would think not. The plaintiffs had suffered injustice and prejudice due to the indolent and recalcitrant attitude of the third defendant.

CONCLUSION

[36] For the reasons outlined above, I allow the PO raised by the plaintiffs, and dismissed the third defendant's setting aside application with costs of RM2,000.

Application dismissed.

Reported by Afiq Mohamad Noor